USAWC STRATEGY RESEARCH PROJECT

SERVICEMEMBER PROTECTIONS REQUIRED TO BUILD AND MAINTAIN AN OPERATIONAL RESERVE

by

Colonel George C. Aucoin
United States Marine Corps Reserve

Colonel Michael W. Hoadley
Project Adviser

U.S. Army War College
CARLISLE BARRACKS, PENNSYLVANIA 17013

Report Documentation Page

Form Approved
OMB No. 0704-0188

1. REPORT DATE	2. REPORT TYPE	3. DATES COVERED
30 MAR 2007	**Strategy Research Project**	**00-00-2006 to 00-00-2007**

4. TITLE AND SUBTITLE	5a. CONTRACT NUMBER
Servicemember Protections Required to Build and Maintain an Operational Reserve	5b. GRANT NUMBER
	5c. PROGRAM ELEMENT NUMBER
6. AUTHOR(S)	5d. PROJECT NUMBER
George Aucoin	5e. TASK NUMBER
	5f. WORK UNIT NUMBER
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES)	8. PERFORMING ORGANIZATION REPORT NUMBER
U.S. Army War College,Carlisle Barracks,Carlisle,PA,17013-5050	
9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)	10. SPONSOR/MONITOR'S ACRONYM(S)
	11. SPONSOR/MONITOR'S REPORT NUMBER(S)

12. DISTRIBUTION/AVAILABILITY STATEMENT
Approved for public release; distribution unlimited

13. SUPPLEMENTARY NOTES

14. ABSTRACT
See attached.

15. SUBJECT TERMS

16. SECURITY CLASSIFICATION OF:			17. LIMITATION OF ABSTRACT	18. NUMBER OF PAGES	19a. NAME OF RESPONSIBLE PERSON
a. REPORT	b. ABSTRACT	c. THIS PAGE			
unclassified	**unclassified**	**unclassified**	**Same as Report (SAR)**	**26**	

ABSTRACT

AUTHOR: Colonel George C. Aucoin

TITLE: Servicemember Protections Required to Build and Maintain an Operational Reserve

FORMAT: Strategy Research Project

DATE: 30 March 2007 WORD COUNT: 5,265 PAGES: 26

KEY TERMS: USERRA, Employment Discrimination, Employer

CLASSIFICATION: Unclassified

One of the requirements for maintaining an operational Reserve is to provide protections for members of the National Guard and Reserve vis-à-vis the employer's they work for at home. The Uniformed Services Employment and Reemployment Rights Act (USERRA 38 U.S.C. § 4301-4334) provides a series of protections that have been created and amended by Congress and interpreted by executive agencies such as the Department of Labor for the benefit of servicemembers and their employers. Gaps in the law still exist however, and this strategic research project seeks to illustrate a number of those gaps such as suing a State as an employer, the role of employer-employee arbitration agreements within the USERRA context, a definition of career service and its lack of protection under USERRA and the remedies a National Guard member or Reservist has available to him or her under the statute--to name just a few of the topics contained herein. Lastly, this strategic research project will discuss proposals for improvements to the statute to strengthen the protections, under Congressional intent, to encourage noncareer service in the uniformed services.

SERVICEMEMBER PROTECTIONS REQUIRED TO BUILD AND MAINTAIN AN OPERATIONAL RESERVE

> [Veterans' Reemployment Rights Law] is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need.
>
> —Fishgold v. Sullivan Drydock and Repair Corp., 328 U.S. 275, 285 (1946)

Congress provided unambiguous protection for all members of the Uniformed Services (including noncareer National Guard and Reserve members, as well as active duty personnel) in October 1994 with the passage of the Uniformed Services Employment and Reemployment Rights Act (USERRA), Chapter 43 U.S. Code.[1] At the direction of Congress and the Department of Defense, a study team at the Center for Strategic and International Studies concluded an eighteen-month study entitled, "The Future of the National Guard and Reserves." The study examined all seven Reserve Components and focused on the core strategic issues that will form the future building blocks of a sound, sustainable Reserve Component.[2] The study's overall message is that the Reserve Component is critical to the strength of the Nation's military and that today's Citizen Soldiers are at an important crossroads. With the surge in military operations since September 11, 2001, and the 2006 Quadrennial Defense Review emphasis on fighting "the long war" the demand for Reserve forces has increased exponentially and will continue to remain significant. The study argues that the nature of Reserve service needs to be reconceptionalized. Significant policy changes, among other suggestions, are needed to enable a successful transition from the old strategic Reserve model to today's model of using the Reserve Component as part of the operational force.[3]

It is not an overstatement to say that "[A]s goes the health of the Reserve Component, so goes the health of the all-volunteer force".[4] Part of maintaining the size, capability and readiness of the Reserve Component is maintaining employer support for the Reserve role. Congress passed USERRA after veterans returning from the 1991 Persian Gulf War complained of difficulties in returning to their Federal jobs. Congress laid out the purposes and intent of Congress in creating and amending the protections for Reserve Component members found in USERRA:

> (1) To encourage noncareer service in the Uniformed Services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service;
>
> (2) To minimize the disruption to the lives of persons performing service in the Uniformed Services as well as to their employers,

> their fellow employees, and their communities, by providing for the prompt reemployment of such persons upon their completion of such service; and
>
> (3) To prohibit discrimination against persons because of their service in the Uniformed Services.[5]

The USERRA has been updated and amended many times since it was signed into law by President Clinton on October 13, 1994. Rather than being regarded as a relatively recent law, the USERRA should be seen as a codification of sixty-seven years of Veterans Reemployment Rights law because it has its roots in legislation developed prior to WW II. This research project will highlight recent updates to the 1994 statute to include changes to the law as it applies to reemployment rights against a State as employer that was amended in 1998 as well as amendments and updates to the law adopted by Congress in 2004 expanding the rule of the Office of Special Counsel, requiring increased reporting responsibilities by the Department of Labor and expanding health care coverage for Reservists. An examination of the Department of Labor's Final Regulations emerging on December 19, 2005, which became effective on January 18, 2006, will be examined herein.

USERRA was enacted in part to clarify prior laws relating to the reemployment rights of service members, rights that were first contained in the Selective Training and Service Act of 1940.[6] USERRA's immediate predecessor was the Vietnam Era Veterans' Readjustment Assistance Act of 1974.[7] In construing USERRA and these prior laws, courts have followed the Supreme Court's admonition that,

> This legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need. …And no practice of employers or agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the Act.[8]

The Veterans' Employment and Training Service ("VETS") issued proposed rules implementing the Uniformed Services and Reemployment Rights Act of 1994, as amended, to Congress for adoption pursuant to Congress' invitation to prescribe regulations implementing the provisions of 38 U.S.C. § 4301,*et seq*. with regard to the application of the statute to States, local governments, and private employers.[9]

VETS proposed rules under Congressional authority in order to provide guidance to employers and employees concerning their rights and obligations under USERRA. The Department of Labor intended that their proposed rules apply with "full force and effect" in construing USERRA and their final regulations.[10] Congress adopted the Department of Labor

Veterans Employment and Training Service proposed final rules implementing the USERRA effective January 18, 2006.[11] Jurisprudential interpretation of Congress' statutory construction allows U.S. District Courts, Circuit Courts of Appeal and the Supreme Court of the United States, to consider the Department of Labor's final rules as a secondary source.

Reemployment Rights of Reservists

The USERRA statute is composed of two parts. The first part, 38 U.S.C. § 4311, is concerned with discrimination and retaliation based on an employee's military association. This initial section will explain some of the key rights available under the second part of the statute or 38 U.S.C. § 4312, known as the "reemployment rights" part of the statute.

Section 4312(a) of USERRA creates an unqualified right to reemployment for persons who leave work to serve in a "uniformed service" and who meet the Act's notice-of-service, service-duration, return-to-work notice, and character of service requirements.[12] These requirements are a fairly low burden for the employee/reservist to meet. They are simply that the employee give notice to his employer of his expected absence from work for the purpose of military service, such notice does not have to be written and even an oral notice may not be required if the giving of such notice is "impossible" under certain circumstances.[13] The maximum cumulative length of time an employee/reservist can be absent for military duty from the same employer is five years. The five years absence does not have to be continuous. Additionally, many types of service to include weekend drills, annual training, inactive duty training, and deployment orders under Presidential Recall are excused from the cumulative total.[14] The employee must give notice to his employer of his desire to return to work. Although notification timeframes vary depending on the amount of time the employee has been on military duty, an employee/reservist who is absent and performing military duty for more than one hundred eighty days has up to ninety days to submit an application for reemployment following the completion of military service.[15] The character of service under which the employee/reservist performs duty, if over 30 days, (found on the government form DD-214) must be characterized as "honorable" or performed "under honorable conditions".[16]

In cases brought under § 4312(a), the "plaintiff at all time bears the burden of proving that he is entitled to reemployment" by fulfilling the five factors listed above.[17] However, the defendant bears the burden of proving the affirmative defenses to the unqualified right to reemployment that are set forth in § 4312(d)(1) and 38 U.S.C. § 4312(d)(2). The affirmative defenses are as follows: (1) impossibility or unreasonableness of reemployment due to changed circumstances of the defendant. (2) undue hardship in qualifying the plaintiff or accommodating

the plaintiff's service related disability; and (3) brief, nonrecurrent duration of the plaintiff's pre-service employment.[18]

This burden-shifting aspect of the Act is, from a legal perspective, the most advantageous protection the Reservist could have received from Congress. In other federal employment law such as Title VII of the Civil Rights Act cases or cases brought under the ADEA or Disability Act, the claimant, or plaintiff, always bears the burden of proof at trial with regard to the alleged discrimination of the defendant-employer. However, in lawsuits brought under the USERRA a case that survives Summary Judgment has the advantage of requiring the defendant-employer to prove, by a preponderance of evidence, the reasons it puts forth for discriminating against or terminating the employer/reservist would have been taken in the absence of the claimant's military association and/or obligations.[19]

USERRA's § 4312 provides a right to reemployment rights and benefits after military service so long as the requirements of that section are met and none of the exceptions stated therein apply. Those requirements do not include a showing of discriminatory intent. In other words, there is no requirement to prove what the defendant-employer intended to do by failing to provide prompt reemployment, or terminating a reemployed employee/reservist before the unqualified period of reemployment expires under the statute.[20] To be sure, a claim made under USERRA's reemployment rights section faces less difficulty in getting to trial and in front of a jury than does a discrimination claim under § 4311 which will be discussed in the next section.

<u>Protection from Discrimination on the Basis of Military Association</u>

The law against discrimination of a Reservist is stated as follows:

> § 4311. Discrimination against persons who serve in the uniformed services and acts of reprisal prohibited:
>
> (a) A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.[21]

In these types of cases, the employee/reservist bears the initial burden of proving that military association serves as a motivating factor for actions taken by the defendant/employer.[22] If successfully established, the claimant's case will survive Summary Judgment and get to trial. At trial, the burden of proof shifts to the employer/defendant to prove that the action taken

against the employee would have been taken in the absence of membership, application for membership, service, application for service, or obligation for service.[23]

Recent judicial decisions (known as "case law" or "jurisprudence" by lawyers) have established an interpretation of USERRA's § 4311 as illustrated by the following quotation from an oft cited case in discrimination cases:

> The factual question of discrimination motivation or intent may be proven by either direct or circumstantial evidence. Circumstantial evidence will often be a factor in these cases, for discrimination is seldom open or notorious. Discriminatory motivation under the USERRA may be reasonably inferred from a variety of factors, including proximity in time between the employee's military activity and the adverse employment action, inconsistencies between the proffered reason and other actions of the employer, and employer's expressed hostility towards members protected by the statute together with knowledge of the employee's military activity, and disparate treatment of certain employees compared to other employees with similar work records or offenses.[24]

A good definition of "motivating factor" is found in *Robinson v. Morris-Moore Chevrolet-Buick, Inc.,* 974 F.Supp. 571, 576 (E.D. Tex. 1997):

> The term "motivating factor" means that if the employer was asked at the moment of the decision what its reasons were and if it gave a truthful response, one of those reasons would be the employee's military position or related obligations. …In other words, Robinson's military position and related obligations were a motivating factor in Morris-Moore's decision if it relied upon, took into account, considered, or conditioned its decision on Robinson's military-related absence.[25]

The difficulty in discrimination cases for the employee/reservist is that the servicemember bears the initial burden of proof which, in fact, requires him to "get into the head" of his employer with regard to the 'intent' of the alleged act of discrimination. The reader should note that § 4311 even protects against discrimination in initial hiring of the employee who isn't a member of the Reserves at the time he applies for an employment position with his employer. The job applicant may mention that he intends to seek a position in the Reserve of any one of the uniformed services and if the employer was to truthfully list as one of the reasons it elected not to hire that job applicant was because the applicant intended to apply to serve in the Reserves, then Section (4311) would protect the applicant from discrimination in initial hiring. However, the difficulties with meeting the initial burden of proof with regard to the employer's reasoning for the refusal to hire are so obvious that the Federal Courts rarely see a claim for discrimination against a prospective employer under this Section of the statute. The following section will illustrate additional difficulties under the law for the Reservist when suing a particular "class" of employers.

Suing a State as "Employer"

USERRA originally provided for litigation against state employers in Federal Court. However, after USERRA was enacted, the Supreme Court issued its decision in *Seminole Tribe v. Florida,* 517 U.S. 44 (1996), holding that Congress cannot use its commerce power under Article I of the Constitution to override state's immunity under the Eleventh Amendment from private suits for damages. *Seminole Tribe* spawned controversy over whether the Eleventh Amendment barred private suits against State employers under USERRA, which was enacted pursuant to Congress' war powers under Article I.[26] In a creative effort to head off the Eleventh Amendment problem, Congress amended USERRA in 1998 to expand jurisdiction over state employees' USERRA suits to include the state courts.[27] However, according to the Seventh Circuit Court of Appeals, as a result of the amendment, no federal court jurisdiction, not even under 28 U.S.C. § 1331, exists over a person's USERRA claims against a State employer.[28]

Congress' attempt to bypass state immunity by placing jurisdiction over private suits against state employers in state courts proved to be short lived. In 1999, the Supreme Court turned to use of the state court's as alternative fora for private federal suits against states when it held in *Alden v. Maine,* 527 U.S. 706 (1999), that in the absence of consent, states enjoy sovereign immunity in their own courts from private suits for damages for violations of federal laws enacted pursuant to Congress' power under Article I. In the wake of *Alden v. Maine*, whether a private action for damages can be brought in state court under USERRA depends on whether the state has waived or consented to suits. In November 1998, Congress passed §211 of the Veterans' Programs Enhancement Act to "fix" the state employee remedy against state employers.[29] The legislation amends § 4323 of the USERRA, by allowing the U.S. Department of Justice to sue on behalf of state employees in the name of the United States.[30] This remedy for state employees relies upon the U.S. Departments of Labor and Justice finding that the complaintant's case has legal merit.[31] If so, the Department of Justice sues the state in the name of the United States, avoiding the Eleventh Amendment issue. Upon recovery of damages, the federal government pays the money won to the Reservist.[32]

What if the state employee wishes to sue his state employer using private counsel, or the Departments of Justice or Labor find that his suit has no merit? The change in the law implemented through § 211 of the Veterans' Programs Enhancement Act indicates that the action "may be brought in a state court of competent jurisdiction in accordance with the laws of the state."[33] In a case pending before the U.S. District Court sitting in Anchorage, Alaska, the challenge to the Eleventh Amendment state sovereignty issue is awaiting a ruling.[34] The only Circuit Court of Appeal which conclusively excludes suits filed against states by state

employees is the 7th Circuit Court of Appeal which, under Judge Posner, ruled that state employees not represented by the Department of Justice or rejected for representation would not get the same access to the federal courts as USERRA plaintiffs suing private employers or local government employers.[35] According to at least one Judge Advocate General (JAG) of the United States Army, "the 7th Circuit's reasoning in *Velasquez* is disturbing. Nowhere in the legislative history of the amended provision [38 U.S.C. § 4323] did Congress indicate that it wished to limit state employee lawsuits to state courts."[36]

In the *Townsend* case, cited supra, the U.S. District Court in Alaska falls underneath the 9t Circuit Court of Appeals sitting in San Francisco. There are no previous 9th Circuit (which includes the State of California) rulings which turn on the issue of state sovereignty issues in a USERRA case to date. It will be an inevitable evolution of the law to see whether the District Court in Alaska applies the 7th Circuit Court of Appeals precedent disallowing suits filed against a state representing an employee/reservist on behalf of a private attorney or the Alaskan Federal Court interprets the meaning of the statute to include allowing such suits against a state, filed by private counsel, in Federal Court.[37]

In state court, each state interprets the USERRA differently, resulting in inconsistent application of the law in each state. The language of the amendment indicating that state employee lawsuits will be filed "in accordance with the laws of the state" guarantees different results in each state, as each state interprets USERRA against its state law.[38] Every state has some level of protection regarding leave of absence for or reemployment of service members with the exception of the District of Columbia which has no provision.[39] The range of protections varies significantly by state. As a general rule, public sector service members have greater protection than do private sector service members. The following chart summarizes the major state law provisions.

STATE	CITE	DESCRIPTION
Alabama	Ala. Code § 31-12-2	Adopts USERRA as state law.
Alaska	Alaska Stat. § 26.05.075	Requires leave of absence (LOA) status and reemployment at same pay, seniority, and benefits.
Arizona	Ariz. Rev. Stat. § 26-168	Requires LOA status and reemployment for both public and private employees entitles public employees to LOA status, with pay for no greater than thirty days in any two consecutive years.
Arkansas	Ark. Code Ann. § 12-62-413	Demands same reemployment rights, privileges, and benefits as if employees had fulfilled federal duty.
California	Cal. Mil. & Vet. Code § 395.01	Requires LOA status for public employees for up to 180 days; entitles public employees to LOA status with pay for first thirty days of absence if the employee's tenure

		exceeds one year.
	Cal. Mil. & Vet. Code § 395.06	Requires LOA status and restoration to former position or position of like seniority, status and pay.
Colorado	Colo. Rev. Stat. § 28-3-506	Prohibits discrimination against members of National Guard in matters including hiring and retention during Service.
	Colo. Rev. Stat. § 28-3-601	Entitles public employees to LOA status.
	Colo. Rev. Stat. § 28-3-610.5	Requires LOA status for, and reemployment of, private sector employees.
Connecticut	Conn. Gen. Stat. § 27-33	Requires LOA status for public sector employees, with pay for first thirty days of absence during calendar year; entitles public employees to reemployment.
	Conn. Gen. Stat. § 33a	Requires LOA status for absence of private sector employees for training only.
Delaware	Del. Code Ann. Tit. 14, § 905	Demands same reemployment rights, privileges, and protections as if employees had fulfilled federal duty.
Florida	Fla. Stat. Ann. § 115.09	Entitles public sector employees to LOA status, with pay for first thirty days of absence.
	Fla. Stat. Ann. § 250.481	Requires retention of public and private employees.
Georgia	Ga. Code Ann § 38-2-279	Entitles public employees to LOA status, with pay for first thirty, or under limited circumstances, sixty days of absence; entitles public employee to LOA status for training sessions no to exceed a total of six months over a four year period; protects public employees against loss of position, privileges, or benefits.
	Ga. Code. Ann. § 38-2-280	Requires LOA status for private sector employees; requires reemployment to same or like position unless unreasonable or impossible; prohibits termination of reemployed persons without cause for period of one year from date of reemployment.
Hawaii	Haw. Rev. Stat. § 121-43	Requires LOA status and restoration to former position or position of like seniority, status, pay and benefits; forbids termination of reemployed persons without case for period of one year from date of reemployment.
Idaho	Idaho Code § 46-607	Demands reemployment to same or like position if the employee's absence was less than one year; prohibits termination of reemployed persons without cause for period of one year from date of reemployment.
Illinois	20 Ill. Comp. Stat. § 1805/30.5	Requires reemployment to same or like position unless reemployment is impossible or unreasonable, or would constitute undue hardship on employer.
	20 Ill. Comp. Stat. §	Requires LOA status; prohibits termination of

	1805/30.20	reemployed persons without case for period of one year from date of reemployment.
Indiana	Ind. Code Ann. § 10-16-7-5 Ind. Code Ann. § 10-16-7-6 Ind. Code Ann. § 10-17-4-4	Requires LOA status for public employees, with pay for first fifteen days of calendar year. Requires LOA status for private employees for period of military service. Requires LOA status, for up to fifteen days per calendar year, for public and private employees for attendance at training sessions.
Iowa	Iowa Code Ann. § 29A.28 Iowa Code Ann. § 29A.43	Entitles public employees to LOA status, with pay for first thirty days of absence; entitles public employees to return to prior position. Requires LOA status for, and reemployment of, private sector employees.
Kansas	Kan. Stat. Ann. § 48-517	Requires LOA status and reemployment, unless reemployment would be impossible or unreasonable or would constitute undue hardship on employer; prohibits termination of reemployed persons without case for period of one year from date of reemployment.
Kentucky	Ky. Rev. Stat. Ann. § 38.238	Requires LOA status and reemployment at same pay, status, seniority, and benefits.
Louisiana	La. Rev. Stat. Ann. § 29:38 La. Rev. Stat. Ann. § 29:410	Requires LOA status and restoration to same or comparable position at no less than prior compensation. Provides exception to reemployment requirement for certain circumstances in event that service exceeds five years; provides exception for reemployment requirement in case of impossibility, unreasonableness, or undue hardship of employer.
Maine	Me. Rev. Stat. Ann. Tit. 26 § 811	Requires LOA status and reinstatement at similar pay, seniority, benefits, and status.
Maryland	Md. Code Ann. Pub. Safety § 13-705	Adopts USERRA as state law.
Massachusetts	Mass. Gen. Laws Ann. Ch. 33, § 13 Mass. Gen. Laws Ann. Ch. 33, § 59 Mass. Gen. Laws Ann. Ch. 33 § 59A	Prohibits discrimination against members of state militia. Establishes that public employees will note lose pay or vacation time for service not exceeding thirty-four days in fiscal year. Requires LOA status for public employees attending training sessions.
Michigan	Mich. Comp. Laws Ann. § 32-273	Requires reemployment at similar pay, benefits and seniority; provides exception to reemployment requirement for limited circumstances in the event that employee's service exceeds five years.
Minnesota	Minn. Stat. Ann. § 192.26	Establishes that public employees will note lose pay or

		other benefits for service not exceeding fifteen days per calendar year. Requires LOA status and reinstatement rights for both public and private sector employees.
Mississippi	Miss. Code Ann. § 33-1-19	Requires LOA status and restoration to previous or similar position.
Missouri	Mo. Ann. Stat. § 40.490 Mo. Ann. Stat. §§41.942 & 105.270	Adopts federal reemployment requirements as sate law. Requires LOA status for public employees with no loss of position, vacation, seniority, or other benefits.
Montana	Mont. Code Ann § 10-1-603	Requires LOA status and reemployment with same pay, seniority, status, and other benefits.
Nebraska	Neb. Rev. Stat. Ann. § 55-161	Adopts certain provisions of USERRA state law.
Nevada	Nev. Rev. Stat. Ann. § 412.139 Nev. Rev. Stat. Ann § 412.1395 Nev. Rev. Stat. Ann § 281.145	Prohibits termination of employees ordered to active duty. Entitles any employee terminated in violation of § 412.139 to immediate reinstatement. Entitles public sector employee on active duty (including training) to paid absences and no loss of vacation time for periods up to fifteen days per calendar year.
New Hampshire	N.H. Rev. Stat. Ann. § 110-C:1	Adopts USERRA as state law.
New Jersey	N.J. Rev. Stat. Ann. § 38:23C-20	Requires LOA status; entitles employees to reinstatement to same or like position unless it is impossible or unreasonable; prohibits termination of reemployed persons without cause for one year from date of reemployment.
New Mexico	N.M. Stat. Ann. § 20-4-6 N.M. Stat. Ann. § 28-15-1	Prohibits any adverse action against applicants or employees on the basis that that person is a member of, or has applied for membership in, the National Guard. Requires reinstatement to same or like possible unless it is impossible or unreasonable.
New York, N.Y.	N.Y. Mil. Law § 317	Requires restoration to same or like position unless impossible or unreasonable; requires LOA status with no loss of seniority or benefits; forbids termination of reemployed persons without cause for period of one year from date of reemployment.
North Carolina	N.C. Gen. Stat. § 127A-202.1	Prohibits the denial of employment, reemployment, retention, promotion or any other benefits on the basis that the person is a member of, or has applied for membership in, the National Guard.
North Dakota	N.D. Cent. Code § 37-01-25 N.D. Cent. Code § 37-	Entitles public employees to LOA status, with first twenty workday absences of each calendar year without the loss of pay. Requires reinstatement of public sector employees to

	01-25.1	same or like position; prohibits termination of reinstated employees without cause for one year from date of reinstatement.
Ohio	Ohio Rev. Code. Ann. § 5903.02 Ohio Rev. Code. Ann. § 5923.05	Adopts USERRA as state law. Entitles public sector employees to LOA, with first absent month per calendar year without loss of pay; entitles public employees absent for longer than one month to monthly payment during absence equal to difference between the employee's civilian and uniformed pay, or $500, whichever is less.
Oklahoma	Okla. State Ann. Tit. 44 § 208.1 Okla. State Ann. Tit. 44 § 209 & tit. 72, § 48 Okla. State Ann. Tit. 72, § 48.1	Adopts USERRA as state law. Requires LOA status for public sector employees, with pay for first twenty days of absence. Requires LOA status for private sector employees.
Oregon	Or. Rev. Stat. § 408.270	Requires restoration of public sector employees to same or like position; prohibits termination of restored employees without cause for period of one year from date of restoration.
Pennsylvania	Pa. Stat. Ann. Tit. 51, § 7309	Requires restoration to same or like position unless unreasonable or impossible; requires continuation of health insurance and other benefits for first thirty days of absence, after which the National Guard has the option to continue benefits at his or her own expense.
Rhode Island	R.I. Gen. Laws § 30-11-3	Requires LOA status, requires restoration to same or like position; expressly entitles employees to rights and protections afforded by USERRA.
South Carolina	S.C. Code Ann. § 8-7-90 S.C. Code Ann. § 25-1-2320	Requires LOA status for public sector employees, with pay for first fifteen days of service per year. Requires restoration to same or like position unless unreasonable.
South Dakota	S.D. Codified Laws § 33-17-15.1	Adopts USERRA as state law.
Tennessee	Tenn. Code Ann. § 8-33-109 Tenn. Code Ann. § 58-1-604	Entitles public sector employees to LOA, with pay for up to fifteen days' absence and under certain circumstances, beyond fifteen days. Prohibits an employer from refusing to hire a person on the grounds that he or she is a member of the National Guard due to his or her absence from work due to military service.
Texas	Tex. Gov't Code Ann. § 431.006	Forbids termination of employees due to absence from military service; requires reemployment unless impossible or unreasonable.

	Tex. Gov't Code Ann. § 613.002	Entitles public sector employees to reemployment in same or similar position.
Utah	Utah Code Ann. § 39-1-36 Utah Code Ann. § 39-3-1	Grants LOA status for period of up to five years. Requires LOA status for public employees; requires restoration of public employees to same or equivalent position; prohibits termination of restored employees without cause for period of one year from date of restoration.
Vermont	Vt. Stat. Ann. Tit. 21, § 491 Vt. Stat. Ann. Tit. 21, § 492	Requires LOA status and reinstatement to same position; forbids denial of employment, or reemployment, on grounds that applicant/employee is a member of, or has applied to be a member of, the National Guard. Entitles employee to reemployment rights as specified by certain provisions of USERRA
Virginia	Va. Code Ann. § 44-93.3	Requires reinstatement to same or like position unless unreasonable.
Washington	Wash. Rev Code Ann. § 73.16.005 Wash. Rev. Code Ann. § 73.16.033	Expresses legislature's intent to provide protections for state military service similar to USERRA's protections for federal service. Requires reemployment to same or like position unless changed circumstances make it impossible or unreasonable or it would constitute undue hardship on the employer.
West Virginia	W. Va. Code Ann. § 15-1F-1 W. Va. Code Ann. § 15-1F-S	Requires LOA status for public employees with pay for first thirty days' absence per calendar year and, under certain circumstances, up to sixty days. Entitles public and private sector employees to same reemployment rights granted to U.S. reserve members pursuant to federal law.
Wisconsin	Wis. Stat. Ann. § 45.50	Requires restoration to same or like position unless impossible or unreasonable; requires LOA status and continuation of all benefits except pay; forbids termination of restored employees without case for period of one year from date of restoration.
Wyoming	Wyo. Stat. Ann. § 19-11-108	Requires LOA status, with pay, for public employees attending training sessions for up to fifteen days per calendar year; requires LOA status, without pay, for public employees for training or service exceeding fifteen days, as long as the employee's tenure prior to service exceeded one year; entitles public employees to reinstatement to same or like position; prohibits termination of reinstated public employee without cause for period of one year from date of reinstatement.

	Wyo. Stat. Ann. § 19-11-04 Wyo. Stat. Ann. § 19-11-111	Forbids discrimination against service members regarding employment or reemployment. Entitles private sector employees to reemployment unless impossible or unreasonable or if it would constitute undue hardship on employer; prohibits termination of reemployed persons without cause for period of one year from date of reemployment.

Table 1[40]

The above table of State law provisions particularly apply to members of the National Guard and the Air National Guard who are brought to active duty, or are performing Reserve duty pursuant to state active duty requirements under law invoked by the State Governor. When a Guardsman performs duty under State authority, he has no federally interpreted USERRA protections or even protections under the Servicemembers Civil Relief Act (SCRA).[41]

Career Service

Congress, in its "purpose and sense of Congress" that serves as a preamble to the Act, specifically encourages *noncareer* service in the Uniformed Services.[42] What isn't as apparent is the jurisprudential developments that lead to the conclusion that *career* service is not protected by USERRA. In one case ruled on by the Merit Systems Protection Board (MSPB), a former National Guard Technician found himself ineligible for reemployment rights under USERRA. The court concluded that substantial evidence supported the determination of the MSPB that the former National Guard Technician was not entitled to reemployment rights in a federal civil service position under USERRA because he abandoned his civilian career to pursue career military service as a member of the Active Guard Reserve (AGR). The court determined that the reserve service member had served continuously and repeatedly for fourteen years as a full-time member of the AGR and his service resulted in his eligibility for military retirement and that the service member actively sought extensions of his service, and therefore, his actions created a de facto resignation by indicating to the National Guard that he never intended to return to his civilian position.[43] The Federal Circuit Court of Appeals upheld the Federal Circuit Court's ruling that reemployment rights under USERRA apply only with respect to noncareer military service and that the former National Guard Technician's time served in the military on AGR duty before USERRA was enacted did not count in disputing USERRA's five-year service limitation on his reemployment rights under 38 U.S.C. § 4312(a).[44]

The Applicability of Arbitration and Other Agreements Between Employees and Their Employers

To date, there has been but one decision on the issue of whether USERRA claimants can be compelled to submit their claims to binding arbitration. Mandatory binding arbitration is indeed contrary to the text of the statute and its legislative history.[45] Despite congressional intent, the Fifth Circuit Court of Appeal, presiding over the states of Louisiana, Texas and Mississippi, overturned a Northern District of Texas Federal Court decision holding that "Congress intended to and did supersede private binding arbitration contracts."[46] In *Garrett v. Circuit City Stores, Inc.*, the U.S. District Court, sitting in the Northern District of Texas, held that USERRA trumps private arbitration contracts between an employee and an employer.[47] However, following the subsequent 5th Circuit Court of Appeals reversal, the law as it stands today, is if you bring suit in Federal Court in the states of Louisiana, Texas or Mississippi, the law of the land is that arbitration agreements between employers and noncareer Reservists/employees are valid, binding and supersede protection under USERRA.

The courts are further reducing servicemember protections under USERRA with regard to employee-employer agreements. In a U.S. District Court case in New Jersey decided in March of 2007, the court ruled that an employee can be held to a shorter time limitation to sue his employer for any perceived violations of USERRA by previous agreement with that employer.[48] The case facts are as follows: McKeon-Grano Associates hired Tyrone Aull in April of 2002. At the time of his hiring, Aull entered an agreement with the company providing that he would bring any employment-related legal claims against his employer within six months of the termination of his employment.[49] In January 2004, the U.S. Army called Aull to active duty. Aull returned to work in May 2005 following military duty. In the meantime, McKeon-Grano had reduced Aull's working hours on the basis that the company had lost certain clients during Aull's period of absence. Aull complained to the head of the company that the hours reduction violated his USERRA rights. In August 2005, McKeon-Grano fired Aull for poor work performance. On June 16, 2006, more than ten months after his termination, Aull filed a lawsuit against the company alleging USERRA violations. The court dismissed Aull's lawsuit and upheld the agreement Aull entered into with his employer providing that he would being any employment-related legal claims against his employer within six months of the termination of his employment.[50]

Arbitration statements signed by employees when they are hired by their employers and agreements shortening the time to sue under employment-related statutes like USERRA are two of the ways that savvy employers will use to diminish the protections Congress intended for servicemembers. Particularly, middle-size to large employers who utilize the services of

attorneys to prevent labor suits will benefit the most from employing the protective tactics cited in this section. Alternatively, the next section of this paper will briefly cover one of the incentives that Congress is debating passing into law to encourage employer support of the Guard and the Reserve.

Employee Incentives to Assist Employee/Reservists

Congress, in response to feedback it has received from employers, is considering offering some sort of incentive to hire and maintain Guardsmen, Reservists, and those contemplating entering Reserve or Guard service. According to Thomas F. Hall, Assistant Secretary of Defense for Reserve Affairs, "after mobilizing and deploying over 553,000 Reservists since 9-11, the employers are assisting the U.S. Military more than we know."[51] Members of the House of Representatives are considering amending the Internal Revenue Code to allow employers a credit against income tax equal to fifty percent of the compensation paid to employees while they are performing active duty service as members of the Ready Reserve or the National Guard and of the compensation paid to temporary replacement employees.[52] Assistant Secretary of Defense Hall explained the concerns of Congress that Congress not lose the support of the American employer for the Nations' Guardsmen and Reservists.

> We are currently involved in studies to determine through a series of questions asked of small, medium and large businesses in America, whether a deployment policy of once a year every five years for their employees who are Reservists is sustainable by them and whether an Operational Reserve policy such as that would encourage the employers continued support of the Guard and Reserve. [53]

Offering employers incentives such as a credit against income tax equal to one-half of the amount the employer pays to employees while they are performing military duty and to the temporary replacement employees they hire in the Reservist's absence appears to be a quantifiable incentive which should appeal to employers' bottom line. No such law has been passed or signed, at this point in time, by the President, but its discussion in various committees of the U.S. House of Representatives and the U.S. Senate indicates the concern Congress has for maintaining an Operational Reserve. In the words of Assistant Secretary Hall, "Our main challenge is managing the all-volunteer force."[54]

Remedies

For any service member seeking enforcement of the protections afforded by USERRA, whether the suit is brought by the Attorney General of the United States through the Department

of Justice, the U.S. Office of Special Counsel, or a privately-retained attorney, the remedies afforded by law are the same:

> (1) In any action under this section, the court may award relief as follows:
>
> (A) The court may require the employer to comply with the provisions of this chapter.
>
> (B) The court may require the employer to compensate the person for any loss of wages or benefits suffered by reason of such employer's failure to comply with the provisions of this chapter.
>
> (C) The court may require the employer to pay the person an amount equal to the amount referred to in subparagraph (B) as liquidated damages, if the court determines that the employer's failure to comply with the provisions of this chapter was willful.
>
> (2)(A) Any compensation awarded under subparagraph (B) or (C) of paragraph (1) shall be in addition to, and shall not diminish, any of the other rights and benefits provided for under this chapter.
>
> * * *
>
> (e) Equity powers. The court may use its full equity powers, including temporary or permanent injunctions, temporary restraining orders, and contempt orders, to vindicate fully the rights of benefits of persons under this chapter.[55]

Although USERRA doesn't provide for "punitive" damages, it does provide for "liquidated" damages that the jurisprudential history illustrates has been for an amount that is double the amount of actual damages established at trial.[56]

In addition, the jurisprudence has interpreted "benefits" to include the concept of "front pay" defined as the losses suffered by the plaintiff from the date trial concludes until some defined point in the future (often referred to as "future damages"). In *Duarte v. Agilent Technologies, Inc.*, 366 F.Supp.2d 1039 (D.Colo. 2005) the United States District Court for the District of Colorado ordered Agilent Technologies to pay $383,761.00 to Marine Corps Reserve Lt Col Joseph Steve Duarte. Most of that figure ($324,082.00) was for front pay damages for the period after the court's judgment because it was contemplated that Lt Col Duarte would not be returning to work for Agilent.[57] Congress' definition of "benefit of employment", as statutorily provided, means any advantage, profit, privilege, gain, status, account, or interest (other than wages or salary for work performed) that accrues by reason of an employment contract or

agreement or an employer policy, plan, or practice and includes rights, and benefits under a pension plan, a health plan, an employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and the opportunity to select work hours or location of employment.[58] The recovery categories of money damages in federal court, in addition to an opportunity for the court to order enforcement of the provisions of the act, are fairy broad and impose a quantifiable burden on the employer to follow Congressional intent and the Law.

Proposals for Improvements to the Statute

The Uniformed Services and Reemployment Rights Act significantly strengthens and expands the employment and reemployment rights of all Uniformed Service members. Despite the breadth and complexity of the Congressional Statute's provisions and in light of the juris prudential interpretations of this law, as amended, since 1994 there have emerged several gaps in protection which could be responded to by future sessions of Congress. Congress continues to show interest in the protections and benefits available to service members of all components. Although they worked, comprehensively, to modernize and update the Soldiers' and Sailors' Civil Relief Act protections through the passage of the Servicemembers Civil Relief Act (SCRA), problems with certain of the Act's provisions became apparent. Congress reacted swiftly to further strengthen the legislation's provisions. As to reemployment rights, Congress acted in 1994 in subtle fashion to educate employers and employees on certain key principals.[59] Congress have also worked to improve USERRA protections for federal sector employees.[60] Despite Congressional amendments in 1998, that included specific provisions for bringing suit against a State and the more comprehensive amendments to the statute contained in the Veterans' Benefits Improvements Act of 2004 and the most recent promulgation of final rules by the Department of Labor in 2005 which became effective in January 2006, several more improvements could be made to further strengthen this statute. A non-exclusive list of suggestions that could be considered by the 110th Congress, and subsequent Congress', is contained below:

- Do not allow employers to discriminate by asking perspective employees if they are in the Guard or Reserve.
- Exempt employees from penalties when their insurance lapses if their motor carrier license expires while mobilized.

- Exemption from age restrictions for Federal law enforcement retirement applications when deployment causes the member to miss completion of the application to buy back retirement eligibility.
- Work with Federal agencies to abide by USERRA/SCRA standards.
- Amend 38 U.S.C. § 4323(d)(1)(C) - - the "liquidated damages" provision in the amount of $20,000.00, or the amount of actual damages, whichever is greater. Provide a provision in § 4324 - - the Federal Executive agencies provision, such as found in § 4323 - - as it applies to states, political subdivisions of states, and private employers.
- Amend Title 38 U.S.C. § 4323(e) to mandate (rather than simply permit) injunctive relief to prevent or correct a USERRA violation.
- Amend Title 49 U.S.C. § 44935 to include Transportation Security Administration (TSA) screeners under USERRA.
- Amend 38 U.S.C. § 4302(b) to make it clear that USERRA overrides an agreement to submit future USERRA disputes to binding arbitration.
- Amend 38 U.S.C. § 4303 (definition of "employer") to clarify that a successor in interest inherits the predecessor's USERRA obligations and that there need not be a merger or transfer of assets to support a finding of successor liability.
- Amend 38 U.S.C. § 4323 and § 4324 to authorize punitive damages for willful and egregious USERRA violations.[61]

Legal assistance practitioners, labor counsel of the Department of Justice, attorneys at the Office of Special Counsel, administrative lawyers and employment and labor lawyers of both the plaintiff's and defendant's bar should take note of the developments of USERRA and the amendments made by Congress and passed into law by signature of the President, together with recently effected Department of Labor final rules for the interpretation of USERRA which have emerged little more than one year ago and be prepared for further activity. Since September 11, 2001, the United States has called over 553,000 Reservists "to the Colors." Given the use of the Reserve over the last few years and recognizing that the Reserves are in transition from the old strategic Reserve model to the current model of using the Reserve Component as part of the Operational Force, one should conclude that Congress is adamantly focused on protecting servicemembers, their families, and veterans—and that USERRA is one such tool to achieve that end.

Endnotes

[1] See 38 U.S.C. §§ 4301-4334; Pub.L. 103-353, § 8(a)(1).

[2] Christine Wormuth, "A Study: The Future of the National Guard and Reserves," [Reserve Officer's Association] ROA National Security Report, September 2006.

[3] Ibid.

[4] Ibid.

[5] 38 U.S.C. § 4301; added October 13, 1994, Pub.L. 103-353, § 2(a), 108 Stat. 3150; Oct. 9, 1996, Pub.L. 104-275, Title III, Subtitle B, § 311(1), 110 Stat. 3333.

[6] 54 Stat. 885, 50 U.S.C. 301, *et seq*.

[7] 38 U.S.C. §§ 2021-2027 (later recodified at 38 U.S.C. §§ 4301-4307 and commonly referred to as the Veterans' Reemployment Rights Act "VRRA"), which was amended and recodified as USERRA.

[8] See *Fishgold v. Sullivan Drydock and Repair Corp*., 328 U.S. 275, 285 (1946), cited in *Alabama Power Co. v. Davis*, 431 U.S. 581, 584-85 (1977); *King v. St. Vincent's Hosp*., 502 U.S. 215, 221 n.9 (1991).

[9] 38 U.S.C. § 4331 added October 13, 1994, Pub.L. 103-353, § 2(a), 108 Stat. 3168.

[10] See Federal Register 20 CFR Part 1002 Uniformed Services Employment and Reemployment Rights Act of 1994; final rules Monday, Dec.19, 2005.

[11] Ibid.

[12] See H.R. REP. N.O. 65 1st Sess. pt.1 (1993), *reprinted in* 1994 U.S.C.C.A.N. 2449; S. REP. NO. 158, 103d Cong., 1st Sess. 42 (1993); Explanatory Statement on H.R. 995, 140 CONG. REC. H9136 (Daily ed. Sept. 13, 1994), *reprinted in* 1994 U.S.C.C.A.N. 2493.

[13] 38 U.S.C. § 4303(8).

[14] 38 U.S.C. § 4303(13).

[15] 38 U.S.C. § 4312(e)(1)(D)

[16] 38 U.S.C. § 4304.

[17] *McGuire v. UPS*, 152 F.3d 673, 676 (7 Cir. 1998).

[18] 38 U.S.C. § 4312(d)(1)(A-C).

[19] *N.L.R.B. v. Transportation Management Corp*., 462 U.S. 393, 401 (1983); S.Rep.No. 103-158 at 45 (1993), and H.R.Rep.No. 103-65, Pt. I, at 18, 24 (1993).

[20] Compare the requirements of 38 U.S.C. § 4311(a) to the requirements of 38 U.S.C. § 4312(a).

[21] 38 U.S.C. § 4311(a).

[22] 38 U.S.C. § 4311(c)(1).

[23] Ibid.

[24] *Sheehan v. Dep't of the Navy*, 240 F.3d 1009, 1014 (Fed. Cir. 2001)

[25] *Robinson v. Morris-Moore Chevrolet-Buick, Inc.,* 974 F.Supp. 571, 576 (E.D. Tex. 1997).

[26] Compare *Diaz-Gandia v. Dapena-Thompson*, 90 F.3d 609, 616 n.9 (1 Cir. 1996) (Congress, acting pursuant to its was powers, removed Eleventh Amendment bar to damages; actions brought under VRRA; *Seminole Tribe* does not control war powers analysis) *with Velasquez v. Frapwell,* 160 F.3d 389 (7 Cir. 1998) (Eleventh Amendment barred USERRA claim against State employer; no legislation enacted under any provision of Article I can abrogate State sovereign immunity), *vac'd in relevant part due to lack of jurisdiction*, 165 F.3d 593 (7 Cir. 1999).

[27] See U.S.C. § 4323(b)(2).

[28] *Velasquez*, 165 F.3d at 593.

[29] Veterans' Program Enhancement Act of 1998, Pub.L.No. 105-368, § 211, 112 Stat. 3315, 3331 (codified at 38 U.S.C. § 4323 [West 1999]).

[30] Ibid.

[31] 38 U.S.C. § 4323(a)(1).

[32] 38 U.S.C. § 4323(d)(2)(B). No regulations currently exist to implement this provision.

[33] 38 U.S.C. § 4323(b)(2) as amended in 1998.

[34] See *Robert David Townsend v. University of Alaska and University of Alaska at Fairbanks*, 3:06-cv-00171-TMJ, filed July 20, 2006 in U.S. District Court, Anchorage, Alaska. Suit brought by the author on behalf of an Alaska Air National Guard soldier.

[35] *Velasquez v. Frapwell*, 160 F.3d 389 (7 Cir. 1998), *vacated in part*, 165 F.3d 593 (7 Cir. 1999).

[36] Lieutenant Colonel Conrad, "USERRA Note - The 1998 USERRA Amendments", *The Army Lawyer*, August 1999, page 54.

[37] Donald L. Hyatt, Memorandum in Opposition to Defendants' Motion to Dismiss Complaint filed in *Townsend v. University of Alaska and University of Alaska at Fairbanks*, Case No 3:06-cv-00171-TMD.

[38] Lieutenant Colonel Conrad, 55.

[39] John F. Beasley, Jr. and Marisa Anne Pagnattaro, "Reemployment Rights for Noncareer Members of the Uniformed Services: Federal and State Law Protections," *The Labor Lawyer*, Vol. 20, No.2, Fall 2004, p. 169.

[40] Ibid. 169-175.

[41] In accordance with provisions of individual state law. The provisions of the SCRA (50 U.S.C. §§ 500-548, 560-591) do not apply to state law.

[42] 38. U.S.C § 4301(a)(1).

[43] See *Woodman v. Office of Personnel Management*, 258 F.3d 1372 (Fed. Cir. 2001), *reh'g and reh'g en banc denied* (Oct. 2, 2001).

[44] Ibid.

[45] USERRA expressly states that the statute "supersedes any…agreement…that reduces or limits, or eliminates in any manner, any right or benefit provided by [USERRA]." 38 U.S.C. § 4302(b). In explaining this provision, the legislative history states that "[i]t is the Committee's intent that, even if a person protected under the Act resorts to arbitration, any arbitration decision shall not be binding as a matter of law." H.R. REP. N.O. 65 1st Sess. pt.1 (1993), *reprinted in* 1994 U.S.C.C.A.N. 2449; S. REP. NO. 158, 103d Cong., 1st Sess. 42 (1993); Explanatory Statement on H.R. 995, 140 CONG. REC. H9136 (Daily ed. Sept. 13, 1994), *reprinted in* 1994 U.S.C.C.A.N. 2493.

[46] *Garrett v. Circuit City Stores, Inc.,* 449 F.3d 672 (5th Cir. 2006).

[47] *Garrett v.Circuit City Stores, Inc*., 338 F.Supp 2d 717 (N.D.Tex 2004)

[48] *Aull v. McKeon-Grano Assocs., Inc*. (D.N.J. 06-2752).

[49] Gregory B. Reilly, "New Jersey Federal Court holds that an employee is bound by his agreements shortening time to sue under USERRA", A.S.A.P., a Littler Mendelson time-sensitive newsletter, March 2007

[50] *Aull v. McKeon-Grano Assocs., Inc.* (D.N.J. 06-2752); Gregory B. Reilly, page 1.

[51] The Honorable Thomas F. Hall, Assistant Secretary of Defense for Reserve Affairs, interviewed by author, 21 March 2007, Carlisle, PA.

[52] 110th Congress, 1st Session, H.R. 1213, February 16, 2007.

[53] Thomas F. Hall, 21 March 2007, Carlisle, PA.

[54] Ibid.

[55] 38 U.S.C. § 4323.

[56] *Fink v. City of New York*, 129 F.Supp.2d 511 (E.D. N.Y. 2001) (liquidated damages awarded by using test from ADEA cases; prejudgment interest awarded "to make plaintiff whole").

[57] *Duarte v. Agilent Technologies, Inc*., 366 F.Supp.2d 1039 (D. Colo. 2005) tried to a bench decision in front of Colorado's Senior District Court Justice, Lewis Babcock by the author in March of 2005.

[58] 38 U.S.C. § 4303(2).

[59] See the Veterans' Benefits Improvement Act of 2004, Pub.L. 08-454 § 204, 118 Stat. 3598, 3606-8.

[60] Ibid.

[61] Samuel F. Wright, CAPT USNR, ROA Position Paper, JAN 2007. CAPT Wright is one of the original author's of the USERRA statutory language advanced by Congress in 1994.